Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

GOPAL KAPOOR, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

William M. Brodsky, Esq.
BADEN KRAMER HUFFMAN
& BRODSKY, P.C.
20 Broad Street
New York, New York 10005
(212) 363-7020
Attorney for Petitioner

QUESTION PRESENTED

Whether the Fifth and Sixth Amendments to the United States Constitution require that materiality, an essential element of the crime of perjury in violation of 18 U.S.C. § 1623, be submitted to the jury to be found beyond a reasonable doubt?

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OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit is not published and is reproduced the Appendix.

JURISDICTION

The Second Circuit Court of Appeals filed its opinion on April 6, 1995. This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States - Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States - Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously

ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Statute - 18 U.S.C. § 1623 (1993):

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more that $10,000 or imprisoned not more than five years or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the

degree that one of them is necessarily false, need not specify which declaration is false if --

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

STATEMENT OF THE CASE

Subject matter jurisdiction in the District Court was predicated on 18 U.S.C. § 3231 since the defendant, Gopal Kapoor, was indicted and tried in the United States District Court for the Southern District of New York on two counts of making a false declaration before a court of the United States in violation of 18 U.S.C. § 1623.

Subject matter jurisdiction in the Court of Appeals for the Second Circuit was proper under 28 U.S.C. § 1291 since the district court signed final judgment against Mr. Kapoor on September 28, 1994 finding him guilty of count II and not guilty of count I and sentencing him to five months imprisonment followed by five months home confinement. A notice of appeal was timely filed on September 30, 1994.

FACTUAL BACKGROUND

Gopal Kapoor is a legal resident alien of the United States. He first came to the United States in 1986. Until 1991, Mr. Kapoor was employed as a bookkeeper in A.P. Tours & Travel Ltd. ("A.P. Tours"), which was owned jointly by his uncle and cousin Bhagwat and Praful Khanna.

On October 28, 1991, Air-India filed a civil action against A.P. Tours and several of its employees, including Mr. Kapoor. The government introduced by way of stipulation that the Air-India suit raised the following issue:

> Whether [Mr. Kapoor], as an employee of A.P. Tours, used his own personal credit cards, or allowed other employees of A.P. Tours to use his own personal credit cards, for charging airline tickets issued to customers of A.P. tours who had paid A.P. tours in cash or check for the tickets; and whether such use of the A.P. Tours employee's credit cards involved an A.P. Tours employee placing the credit card company's approval code on the credit card charge slips when the credit card company had not in fact authorized an approval code for that charge in that amount.

Another airline, Lufthansa, through an airline service company, had earlier complained to the Secret Service that it had been the victim of what it believed to be credit card fraud. The Secret Service investigated, and on November 6, 1991, obtained a search warrant for A.P. Tours' office and arrest warrants for Mr. Kapoor among others.

On November 7, 1991, Mr. Kapoor was arrested by the Secret Service and taken to the New York Field Office for questioning. Several times after his arrest, Mr. Kapoor asked to speak to an attorney, but his requests were ignored. He did not recall ever being advised of his right to an attorney by the agents. As a result of the pressure brought to bear on him by the agents questioning him, Mr. Kapoor signed, without

reading or understanding, an "affidavit." The affidavit contained the following pre-printed statement:

> I _____ stated that I have been advised by SA _____, United States Secret Service, that under the provisions of the Constitution I have certain rights: The absolute right to remain silent, and that anything I say can be used against me in the court of law or any other proceedings; that I have the right to consult with an attorney before answering any questions or making any statements, and that if I cannot afford an attorney and want one, that one can be appointed for me before I say anything; and if I decide to make any statements now, without an attorney present, I have the right to stop the questioning at any time.

It also contained a statement which was hand-written by Secret Service Agent Bell which contained the following phrases:

> . . . I would put down on the charge form an unauthorized approval code and this would be billed to the airlines to buy time. Praful Khanna approached me in the beginning of 1990 for the use of my cards for purchasing airline tickets using an unauthorized approval code for the card . . . To the best of my knowledge as an accountant I believe the total amount of fraud [crossed out] charge backs [added in Mr. Kapoor's handwriting] among all the cardholders in the company totalled approximately $300,000.

The United States Attorney declined prosecution of A.P. Tours and its employees for the alleged illegal use of credit cards. However, the Air-India civil litigation continued against A.P. Tours and a number of its employees, including Mr. Kapoor. The defense of the Air-India case was undertaken and financed by the primary defendant, Praful Khanna on behalf of himself and all of the named employees. Mr. Khanna hired Chat Gurtu, Esq. as the attorney for all of the defendants.

During the course of the litigation, Air-India served document demands and other discovery requests upon Mr. Gurtu, and defendants' responses, or lack thereof, were handled by Mr. Gurtu. Mr. Kapoor was not able to produce many documents that were of help to Air-India because the AP Tours' documents which Air-India had requested were under Mr. Khanna's control. Air-India believed that the documents that Mr. Khanna produced through Mr. Gurtu were insufficient, so on May 21, 1993, it moved to have the defendants' answers stricken and default judgments entered against them for their failure to comply with proper document demands.

Judge Martin, to whom the civil case was assigned, struck Mr. Khanna's answer and awarded sanctions and costs against both Mr. Khanna and Mr. Gurtu. However, Judge Martin reserved decision on whether to strike Mr. Kapoor's answer. Instead, Judge Martin ordered that an evidentiary hearing be held "at which evidence shall be presented regarding Gopal Kapoor's **possession, knowledge and control of the documents at issue,**" to determine whether Mr. Kapoor had any involvement with Mr. Gurtu's and Mr. Khanna's failure to produce A.P. Tours' documents, and, if so, whether he had done so willfully. (emphasis supplied)

In support of its motion for sanctions, Air-India had submitted to Judge Martin Mr. Kapoor's "affidavit" which had been taken during his interrogation by the Secret Service. Both Air-India's attorney and Judge Martin questioned Mr. Kapoor with respect to the "affidavit." In particular, they questioned Mr. Kapoor about the handwritten portion of the affidavit in which he allegedly admitted using and discussing with Praful Khanna the use of "unauthorized [credit card] approval codes," resulting in a "fraud." They also questioned him regarding the pre-printed paragraph at the top of the form which indicated that Mr. Kapoor had been advised of his rights and had waived them.

In reply to these inquiries, Mr. Kapoor testified that he had not filled out the "affidavit," but instead a Secret Service Agent had. Mr. Kapoor also denied having made the statements attributed to him in the hand-written portion of the "affidavit." Mr. Kapoor admitted having signed the affidavit, but he said that he had felt compelled to sign it after his interrogation by the Secret Service and that he had not understood what he was signing. Furthermore, he said he was not advised by the Secret Service agents of his rights. In fact, he said that he had requested to speak to his counsel and that his request had been denied by the agents.

Since Mr. Kapoor's testimony appeared to contradict the writing in the "affidavit," Judge Martin believed that Mr. Kapoor was lying before him, under oath. Judge Martin, struck Mr. Kapoor's answer in the civil suit and referred the matter to the United States Attorney for prosecution for perjury. In his referral letter, Judge Martin asserted that the alleged false statements made by Mr. Kapoor were material to the discovery sanctions hearing Judge Martin had conducted. Judge Martin wrote:

> At the hearing, Mr. Kapoor denied ever using unauthorized approval codes, denied having any discussion with Mr. Khanna about such codes and denied telling the Secret Service at the time of his arrest that he had used unauthorized codes or discussed them with Mr. Khanna. Mr. Kapoor stated that the reason he signed the affidavit at the time was that he was very nervous and that he had asked for a lawyer but was told by the agents he could not have a lawyer and, therefore, he signed the affidavit without reading it carefully. This contradicts a statement in the affidavit that Mr. Kapoor had been advised of his right to counsel and was willing to answer without counsel.
>
> **The question of whether or not Mr. Kapoor had used unauthorized approval codes and had discussed them with Mr. Khanna was highly material to the proceeding before me. Air-India was trying to determine whether there were any records that would reflect this activity which had not been produced during the course of discovery in the action and whether Mr. Kapoor had been a party to the destruction of those records. This, in turn, was material to the question then before me, which was whether Mr. Kapoor should have his answer stricken because of his failure to comply with his discovery obligations.** (emphasis supplied)

At the perjury trial the defense proved that Mr. Kapoor had not made the statements concerning the use and discussion

of unauthorized credit card approval codes. Agent Sloan admitted that Mr. Kapoor had never used the words "unauthorized", "fraud" or "scam" and that those words were ones that Sloan had used in making his notes of the interview. All that Mr. Kapoor had said was that he had used **authorized** approval codes in an **unauthorized** manner. As a result of this testimony, the jury acquitted Mr. Kapoor of each and every statement that Judge Martin had referred to as material.

During the perjury trial the district court refused to allow the jury to determine materiality beyond a reasonable doubt. Instead, the trial judge decided the issue of materiality himself as a matter of law based only upon evidence submitted by the government on this issue: the indictment, the civil complaint, Judge Martin's opinion ordering the hearing, and a copy of Mr. Kapoor's testimony at the hearing. Mr. Kapoor, despite making a specific request to do so, was denied any opportunity to confront and cross-examine the witnesses against him on this issue. There was, in fact, no fact-finding hearing at all. In effect, the court granted a partial directed verdict against the defendant.

REASONS FOR GRANTING THE WRIT

I

The question posed by this case, whether the Constitution requires that the element of materiality in a prosecution for perjury in violation of 18 U.S.C. § 1623 be determined by the jury beyond a reasonable doubt, is now before the Court in an analogous case, *United States v. Gaudin*, No. 94-514, involving the materiality element of 18 U.S.C. § 1001. *Gaudin* was argued April 17, 1995.

We submit that the Court's decision in *Gaudin* will in all likelihood determine the outcome of this case. Accordingly, we respectfully suggest that the Court hold this petition in abeyance pending the decision in *Gaudin*.

II

THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION REQUIRE THAT IN A CRIMINAL PERJURY CASE, MATERIALITY IS AN ISSUE OF FACT FOR THE JURY TO DECIDE BEYOND A REASONABLE DOUBT

In *In re Winship*, this Court declared that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. 358, 366 (1970). This strict approach was affirmed twice by the Court which reiterated that it would "not disturb the balance struck in previous cases holding the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210 (1977) (emphasis added). *See also*, *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

Building upon the constitutional base it established in *Winship*, the Court has also held that Due Process not only requires proof of each and every element of an offense beyond a reasonable doubt, but also mandates that each element be proved to the "trier of fact." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). It has long been understood that the Sixth Amendment right to trial by jury includes the right to a jury determination of each essential element of the charged offense. Indeed, in those instances where this right has been jeopardized, the Court has wasted no time correcting the error. *See*, *e.g.*, *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979)

(disapproving the instruction "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" because it "would 'invade [the] fact finding function' which in a criminal case the law assigns solely to the jury."); *United States v. United States Gypsum*, 438 U.S. 422, 435 (1979) ("[A] defendant's state of mind is an element of a criminal antitrust offense which...cannot be taken from the trier of fact...."); *Morissette v. United States*, 342 U.S. 246 (1952), (reversing a conviction for conversion of government property where it was determined that the element of criminal intent was effectively taken from the jury by an instruction that such intent was to be presumed if the appellant consciously and intentionally removed certain property).

Read together, *Winship*, *Mullaney*, *Jackson*, *Patterson*, *United States Gypsum*, and *Sandstrom* compel the conclusion that the existence of all essential elements of a charged offense must be determined by the jury under the reasonable doubt standard. Removing a single essential element from the jury's consideration amounts to directing a partial verdict against the defendant, a practice specifically condemned by this Court. *Sullivan v. Louisiana*, 113 S.Ct. 2078, 2080-81 (1993); *see also*, *Sandstrom*, 442 U.S. at 516, n. 5; *Patterson*, 432 U.S. at 210; *United States v. Heller*, 635 F.2d 348, 857 (Temp. Emerg. Ct. of App. 1980) and cases cited therein.

By an order filed on April 6, 1995, the Court of Appeals for the Second Circuit affirmed Kapoor's conviction holding that, "Judge Haight correctly treated the element of materiality as a matter of law to be resolved by the trial court." The Court of Appeals relied almost exclusively on this Court's decision in a civil deportation proceeding, *Kungys v. United States*, 485 U.S. 759 (1988), where the Fifth and Sixth amendments were not implicated. The Second Circuit's

reliance on the *Kungys* dicta is unfortunate because *Kungys* is inconsistent with constitutional standards applicable to criminal cases. The Court of Appeals quotes a statement from *Kungys* which reads in part that "the materiality of a statement rests upon a factual evidentiary showing." *Kungys* at 772. Strangely, this is exactly the defendant's position and thus reliance on this language in *Kungys* to affirm the conviction is misplaced. We argue that since materiality, an element of the crime of perjury, is at least in part a factual issue it must be determined by the jury beyond a reasonable doubt.

It is clear that materiality constitutes an essential element of the charged offense. The Second Circuit by its jurisprudence and its order in the instant case concedes as much. *See United States v. Berardi*, 629 F.2d 723, 728 (2d Cir.), *cert. denied*, 449 U.S. 994 (1980); *United States v. Bell*, 623 F.2d 1132, 1134 (5th Cir. 1980). The statute itself makes clear that materiality is an element of the crime. 18 U.S.C. § 1623; *See also Hubbard v. United States*, 63 U.S.L.W. 4393, 4398 (U.S. May 15, 1995) (No. 94-172); *Moskal v. United States*, 498 U.S. 103 (1990); *McMillan v. Pennsylvania*, 477 U.S. 79, 85 (1986). This being so, two propositions would appear to be incontrovertible. First, due process mandates that the government bear the burden of proving materiality beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). Second, the Sixth Amendment requires that the question whether the allegedly false declarations were material be determined by the finder of fact. *Jackson v. Virginia*, 443 U.S. 307 (1979). *See also Sullivan v. Louisiana*, 113 S.Ct. at 2080-81; *Sandstrom v. Montana*, 442 U.S. 510 (1979).

In a powerfully reasoned decision, the Ninth Circuit en banc adopted this position. *United States v. Gaudin*, 28 F.3d

943 (9th Cir. 1994) (en banc), *cert. granted* 115 S.Ct.713 (1995). Three of the states' highest courts have also reached the conclusion that the issue of materiality is for the jury to decide. *See Commonwealth v. McDuffee*, 379 Mass. 353, 398 N.E.2d 463, 469-70 (1979); *New Jersey v. Anderson*, 127 N.J. 191, 603 A.2d 928 (1992); *People v. Hedgcock*, 51 Cal.3d 395, 272 Cal. Rptr. 803, 795 P.2d 1260 (1990).

In *Gaudin*, the en banc Ninth Circuit was faced squarely with the issue of "whether the element of materiality in 18 U.S.C. § 1001 is a question of fact that must be determined by the jury." *Gaudin*, 28 F.3d at 944. Gaudin had been convicted of making false statements under 18 U.S.C. § 1001 by knowingly filling out various government forms in an inaccurate manner. The district court did not submit the issue of materiality to the jury. *United States v. Gaudin*, 997 F.2d 1267, 1269 (9th Cir. 1993). The panel of the Ninth Circuit found that failure to submit the materiality issue to the jury constituted constitutional error. *Gaudin*, 997 F.2d at 1273. The en banc court affirmed the panel and provided a through analysis.

In *Gaudin* the government contended that:

> *Kungys v. United States*, 485 U.S. 759, 108 S.Ct. 1357, 99 L.Ed.2d 839 (1988) . . . confirms that the issue of materiality is a matter of law in criminal false statement cases.

Gaudin, 28 F.3d at 947. The Ninth Circuit rejected this contention, holding that:

> [Kungys] has been determined by some courts to constitute a conclusion that the 1929 *Sinclair* ruling on materiality in criminal cases survives the analysis of the more recent line of cases from *Winship* to *Sullivan*. That issue was not before the court in that civil case. We find it inconceivable that the Supreme Court intended to resolve that constitutional question reconciling the *Sinclair* holding with the later pronouncements in *Winship* through *Sullivan* in a civil non-jury case without ever mentioning the *Winship* line of cases.

Id. at 949. The Court is now faced squarely with the issue and should resolve it explicitly in favor of the *Winship* line.

The en banc Ninth Circuit in *Gaudin*, 28 F.3d 943, determined that materiality was an element of the charged offense, and then turned to the question of whether, as an element, it could be determined as a matter of law. *Id.* at 948. The Ninth Circuit looked at the "customary" test of materiality in false statement statutes which holds a statement material if it "'has a natural tendency to influence, or was capable of influencing, the decision' of the decisionmaking body" *Id.* at 948 (quoting *Kungys*, 485 U.S. at 770). The court concluded that "a factual inquiry would nearly always be necessary to determine what makes a difference to the decisionmaking body . . . even in perjury cases it is difficult to say there is no factual component." *Id.* at 948. Only if what is material is "spelled out in statutes or in regulations" could it be a pure question of law. *Id.* at 948. Otherwise, materiality must be at very least a mixed question of fact and law in which case "it would not be faithful to the Sixth Amendment for the judge to decide the factual component of the element necessary to

constitute the crime." *Id.* at 949. The *Gaudin* analysis is in clear conflict with the rules in the Second Circuit[1/] and elsewhere[2/] which hold that materiality is a matter of law to be decided by the court and need not be proven beyond a reasonable doubt.

Kungys interprets a single Supreme Court decision, decided more than half a century ago, *Sinclair v. United States*, 279 U.S. 263 (1929), from which the materiality-as-a-matter-of-law rule was derived. *Sinclair* involved a prosecution under 2 U.S.C. § 192 for the defendant's alleged refusal to answer "pertinent" questions put to him by a Congressional Committee. Sinclair asserted, inter alia, that the trial court erred in "holding that the question of pertinency was one of law for the court and in not submitting it to the jury...." 279 U.S. at 291. This Court rejected Sinclair's contention holding that "pertinency" is a matter of law similar to the issue of relevance. *Id.* at 298-99. However, this legal premise has been eroded by subsequent cases to the point where it no longer

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[1/] *See United States v. Gribben*, 984 F.2d 47, 50-1 (2d. Cir. 1993); *United States v. Guariglia*, 962 F.2d 160, 163 (2d Cir. 1992); *United States v. Weiss*, 752 F.2d 777, 786 (2d Cir. 1985). *cert. denied*, 447 U.S. 944 (1985); *United States v. Moon*, 718 F.2d 1210, 1237 (2d. Cir. 1983), *cert. denied*, 466 U.S. 971 (1984); *United States v. Cunningham*, 723 F.2d 217, 227 (2d Cir. 1983), *cert. denied*, 466 U.S. 951 (1984); *Berardi*, 629 F.2d at 727-8; *United States v. Mulligan*, 573 F.2d 775, 779 (2d Cir.) *cert. denied* 439 U.S. 827 (1978).

[2/] *See, e.g., United States v. Clark*, 918 F.2d 843 (9th Cir. 1990); *United States v. Bell*, 623 F.2d at 1134; *United States v. Kehoe*, 562 F.2d 65, 68 (1st Cir. 1976), *United States v. Phillips*, 540 F.2d 319 (8th Cir.), *cert. denied*, 429 U.S. 1000 (1976), *United States v. Demopoulos*, 506 F.2d 1171, 1176 (7th Cir. 1975), *cert. denied*, 420 U.S. 991 (1975); *United States v. Paolicelli*, 505 F.2d 971, 973 (4th Cir. 1974).

represents valid law and should be explicitly overruled. This Court has never been reticent about reviewing past decisions which are later demonstrated to be faulty, erroneous or outdated. *See, e.g., Hubbard v. United States*, 63 U.S.L.W. 4393 (U.S. May 15, 1995) (No. 94-172) overruling *United States v. Bramblett*, 348 U.S. 503 (1955); *Nichols v. United States*, 114 S. Ct. 1921 (1994), overruling *Baldasar v. Illinois*, 446 U.S. 222 (1980); *United States v. Dixon*, 113 S. Ct. 2849 (1993) overruling *Grady v. Corbin*, 495 U.S. 508 (1990); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992) overruling *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983).[2/]

The Second Circuit's rule that in a prosecution under 18 U.S.C. § 1623 the trial court must find materiality by a preponderance of the evidence and as a matter of law is not the rule regarding materiality under other federal statues. There is no logical reason that materiality in a perjury case brought under 18 U.S.C. § 1623 should be treated any differently. This Court and numerous others have required the jury to decide the issue of materiality under similar civil and criminal statutes, such as mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), bank fraud (18 U.S.C. § 1344), and the various securities fraud statutes (15 U.S.C. §§ 77q(a), 78j(b) and 17 C.F.R. §240.10b-5). *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *Herman & MacLean v. Huddleston*, 459

[2/]This court itself has pointed out that the doctrine of stare decisis is particularly weak in the area of constitutional law because correction of a badly reasoned or unworkable constitutional interpretation "through legislative action is practically impossible." *Payne v. Tennessee*, 501 U.S. 808, 809, (1991). The Court went on to list 33 of its own previous constitutional decisions which it had reversed in whole or in part over the last 20 terms. Id. at n. 1.

U.S. 375, 382 (1983) (a civil securities fraud action wherein the issue of materiality was submitted to the jury). *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976), a civil securities fraud case, is particularly instructive:

> The issue of materiality may be characterized as a mixed question of law and fact involving as it does the application of a legal standard to a particular set of facts.... The determination [of materiality] requires delicate assessments of the inferences a "reasonable shareholder" would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.

(footnote omitted). After reviewing the evidence of materiality this Court concluded that "[t]hese are questions we think best left to the trier of fact." *Id.* at 460. This Court's jurisprudence results in the anomaly that a defendant in a civil case is generally entitled to have the jury determine the materiality of his false statement, but a criminal defendant in a perjury case is not. The Court can rectify this bizarre situation by interpreting the Fifth and Sixth amendments to require the issue of materiality to be decided by the jury beyond a reasonable doubt in criminal perjury cases.

If, as the Second Circuit has held, the issue of materiality is one of law for the court to decide and not for the jury, then it is illogical and contradictory to require that the government also bear a factual, evidentiary, burden in proving this so-called "issue of law." *See United States v. Abroms*, 947 F.2d 1241, 1246 (5th Cir. 1991) *cert. denied*, ___ U.S. ___, 112 S.Ct. 2992 (1992) ("a standard of proof has no application

to the legal question whether a given statement is material"). However, the Second Circuit's case law clearly requires the government to prove materiality by a preponderance of the evidence. *See* cases cited, *supra*, n. 1. Since the government bears an evidentiary burden on this issue, materiality cannot be viewed as a pure question of law. At the very least, it is a mixed question of fact and law, which should be decided by the trier of fact.

The only policy reasons we can discern for reluctance to adopt what appears plainly to be a Constitutional requirement is a fear that perjury trials will be prolonged and the juries confused while they try a case within a case, or that more people will be acquitted if materiality were submitted to the jury. Neither reason can be a rationale in our democracy for refusing to enforce the Constitution. Moreover, the government at Mr. Kapoor's trial spent a good deal of trial time and introduced several exhibits proving the underlying case, so the jury would comprehend the "background" for Mr. Kapoor's statements. There is no reason that the jury could not also have determined under proper instructions whether Mr. Kapoor's statements were material.

CONCLUSION

For all the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Second Circuit to review its decision in *United States of America v. Gopal Kapoor*.

Dated: New York, New York
May 25, 1995

Respectfully submitted,

William M. Brodsky, Esq.

BADEN KRAMER HUFFMAN
& BRODSKY, P.C.
20 Broad Street
New York, New York 10005
(212) 363-7020
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of April, one thousand nine hundred and ninety-five.

PRESENT: HONORABLE JON O. NEWMAN
Chief Judge.
HONORABLE RALPH K. WINTER,
HONORABLE J. DANIEL MAHONEY.
Circuit Judges.

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UNITED STATES OF AMERICA,
Appellee,

94-1538

v.

GOPAL KAPOOR,
Defendant-Appellant.

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ORDER

Appeal from the United States District Court for the Southern District of New York (Charles S. Haight, Judge).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Gopal Kapoor appeals from the September 28, 1994, judgment convicting him after a jury trial of perjury, in violation of 18 U.S.C. § 1623 (1988).

On November 7, 1991, Kapoor was arrested by Secret Service agents for credit card fraud he had allegedly committed while an employee of A.P. Tours & Travel Ltd. In the course of being questioned while in custody, Kapoor signed a Secret Service form, labelled an "Affidavit," which contained preprinted language purporting to be an acknowledgement by Kapoor that he had been informed of certain rights, including the right to consult with an attorney, and a handwritten section completed by one of the agents and purporting to be an admission by Kapoor that he had purchased airline tickets using "unauthorized approval codes" for his personal credit cards.

Although the Government never brought criminal credit card fraud charges against Kapoor, he was named as a defendant in a related civil action initiated in federal court by Air-India. During this civil action, which was assigned to Judge Martin in the District Court, Air-India moved for discovery sanctions against the defendants, including striking the answer of Kapoor for failure to produce documents relating to the alleged fraudulent credit card charges. Judge Martin ordered a hearing for the purposes of assessing Kapoor's credibility and introducing evidence concerning his possession,

control, and knowledge of the requested documents. During this hearing, held on October 21, 1993, Kapoor denied that he had previously told the Secret Service Agents that he had used "an unauthorized approval code," and he testified that he had requested to speak with his attorney before being questioned by the agents, that they had denied his request, and that they had never informed him of his right to consult with an attorney before answering any questions. Believing that Kapoor had committed perjury at the October 21 hearing, Judge Martin referred the matter to the United States Attorney for the Southern District of New York.

Kapoor was subsequently indicted for perjury in two counts, pertaining respectively to his denial that he had admitted to using an "unauthorized approval code" and to his denial that he had been informed of his right to speak with an attorney. The perjury case was assigned to Judge Haight for trial. During its case in chief, the Government introduced Kapoor's "Affidavit" as evidence that he had used the phrase "unauthorized charge codes" and that he had been advised of his right to an attorney during his custodial interrogation by the Secret Service agents. Pursuant to 18 U.S.C. § 3501 (1988), Kapoor requested that the jury be given a specific instruction relating to its role in assessing the voluntariness of his statements to the Secret Service agents. Finding section 3501 inapplicable, Judge Haight denied this request. Before submitting the case to the jury, the Judge also determined, as a matter of law, that the statements for which Kapoor was indicted were material to the purpose of the October 21 hearing before Judge Martin. The jury returned verdicts of not guilty on Count One and guilty on Count Two.

1. Judge Haight correctly found that Kapoor's denial that he had been advised by the Secret Service agents of

his right to consult with an attorney was material to the subject matter of the October 21 hearing before Judge Martin. With regard to perjury committed before a judge sitting as factfinder, "'[t]he test of materiality is whether the false testimony was capable of influencing the fact finder in deciding the issues before [it].'" *United States v. Guariglia*, 962 F.2d 140, 164 (2d Cir. 1992) (quoting *United States v. Fayer*, 573 F.2d 741, 745 (2d Cir.), *cert. denied*, 439 U.S. 831 (1978)). The stated purposes of the October 21 hearing before Judge Martin were to assess Kapoor's credibility and to ascertain whether he had knowledge or possession of documents relating to credit card fraud committed by A.P. Tours & Travel. Kapoor's admission to the Secret Service agents that he had participated in such fraud was clearly relevant to whether he had knowledge of the documents sought. Because Kapoor's denial that he had been advised of his right to consult with an attorney could have affected the weight given to his admission by Judge Martin, that denial was capable of influencing the Judge's resolution of the issues before him.

2. Under well-established precedent, Judge Haight correctly treated the element of materiality as a matter of law to be resolved by the trial court before submitting the remaining issues to the jury. *See Guariglia*, 962 F.2d at 163. In *Kungys v. United States*, 485 U.S. 759 (1988), the Supreme Court held that the materiality of misrepresentations used to procure a certificate of naturalization is properly treated as a question of law, because "'[a]lthough the materiality of a statement rests upon a factual evidentiary showing, the ultimate finding of materiality turns on an interpretation of substantive law,'" *id.* at 772 (quoting *United States v. Abadi*, 706 F.2d 178, 180 (6th Cir.), *cert. denied*, 464 U.S. 821 (1983)). While the holding in *Kungys* pertained to a civil denaturalization statute, 8 U.S.C. § 1451(a), the Court made

clear that the element of materiality in section 1451(a) and in criminal perjury statutes, including 18 U.S.C. § 1623, should be similarly construed. *See id.* at 770. *Kungys* therefore refutes Kapoor's argument that the element of materiality under criminal perjury statutes presents an issue of fact, which under the Fifth and Sixth Amendment would have to be committed to the jury for fact-finding, *see, e.g., Sandstrom v. Montana*, 442 U.S. 510, 523 (1979); and proved by the prosection beyond a reasonable doubt, *see, e.g., In re Winship*, 397 U.S. 358, 364 (1970).

3. The trial judge correctly determined that Kapoor's signed acknowledgement that he had been informed of his right to consult with an attorney, which was preprinted on the "Affidavit" signed by Kapoor while in Secret Service custody, was not a "confession" within the meaning of 18 U.S.C. § 3501 (1988), so that the jury charge prescribed by that section was properly withheld in relation to that portion of the "Affidavit." For the purposes of section 3501, a "confession" is defined as "any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing." 18 U.S.C. § 3501(e) (1988). The jury found Kapoor guilty of perjury only in relation to his denial that he had been informed of his right to consult with an attorney, and the only portion of his "Affidavit" that was relevant to this count of conviction was the preprinted statement acknowledging that he had been informed of his rights. This acknowledgement does not fall within the section 3501(e) definition of a confession. The handwritten portion of the "Affidavit," which appears to be a confession by Kapoor to bank fraud, was relevant only to the count of which Kapoor was acquitted, i.e., the charge that he perjured himself when he denied using the term "unauthorized charge codes" in his statement to the Secret Service agents. Because Kapoor was

acquitted of this count, we need not decide whether the handwritten portion of the "Affidavit" was in fact a section 3501 "confession" in the context of his prosecution for a subsequent act of perjury. Even if erroneous, the District Court's failure to give the section 3501 jury instruction in relation to that portion of the "Affidavit" was rendered entirely harmless by Kapoor's partial acquittal.

/s/ Jon O. Newman
Chief Judge.

/s/ Ralph K. Winter

/s/ J. Daniel Mahoney
Circuit Judges.